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Supreme Court of the United States

October Term, 1955. No. 168

LESTER H. BURDICK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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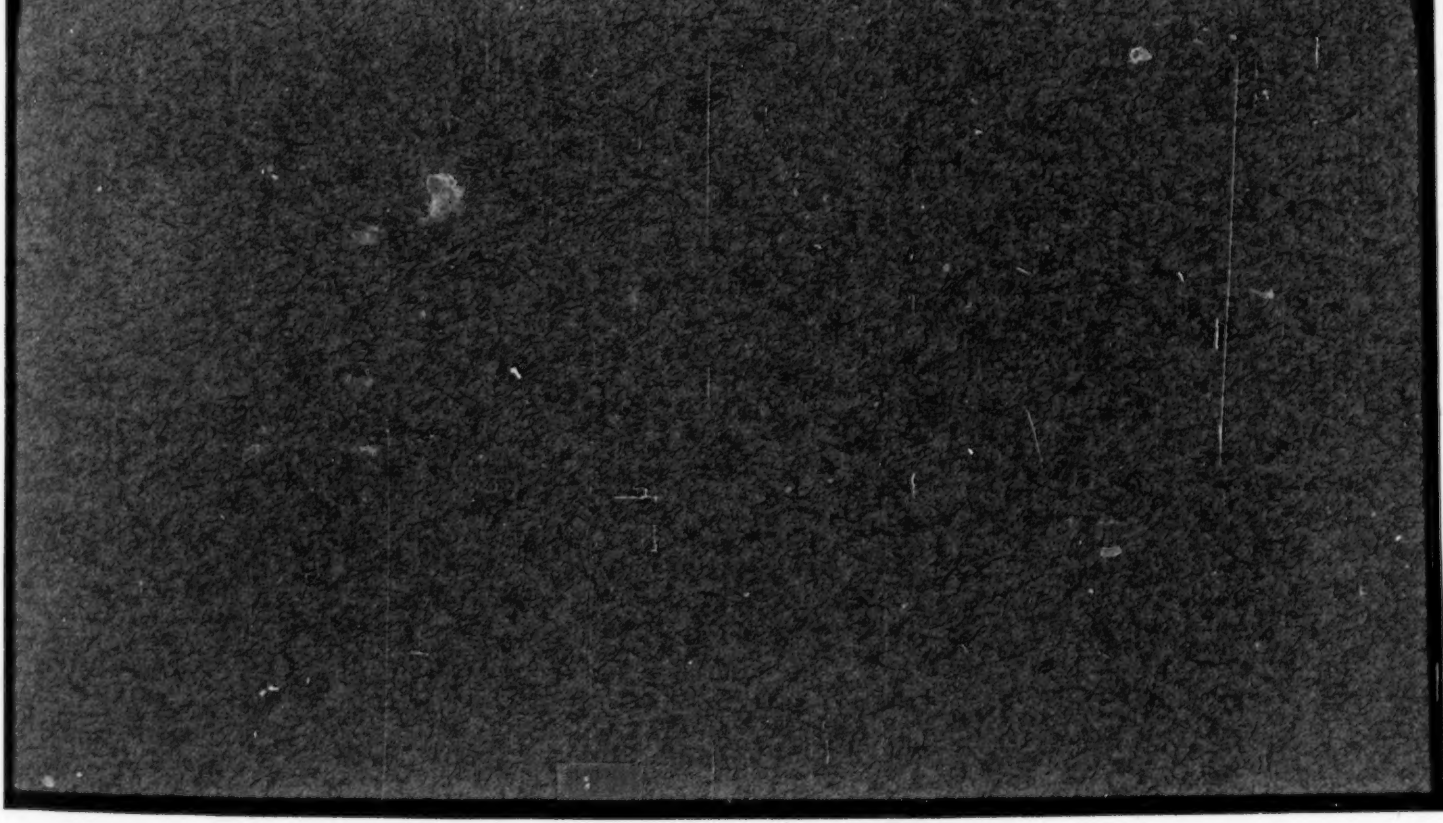

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lester H. Burdick, petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered May 6, 1955, affirming petitioner's conviction of income tax evasion.

OPINIONS BELOW.

The opinion for the United States District Court for the District of New Jersey is unreported. The opinion of the United States Court of Appeals for the Third Circuit has not been reported as yet. A copy of its opinion appears in the appendix at page 44. The Court of Appeals denied Petition for Rehearing on May 24, 1955. A copy of its order appears in the appendix at page 49.

JURISDICTION.

The jurisdiction of this Court is invoked under Act of June 25, 1948, C. 646, 62 Stat. 928, 28 U. S. C. A. Section 1241(1). The order and judgment of the Court of Appeals for the Third Circuit was entered on May 6, 1955. A copy of its judgment appears in the appendix at page 48.

The decision of the Court of Appeals for the Third Circuit in the instant case is squarely in conflict with the recent decisions as laid down by this Court in the cases of *United States v. Holland, Calderon v. United States, United States v. Friedberg* and *United States v. Smith* wherein this Court evolved a new measuring rod which was to be used by all lower courts where the Government sought a conviction for income tax evasion using the so-called net worth-expenditure method.

Further the decision of the Court of Appeals in the instant case completely disregarded the mandate of this Court with reference to its allowance of a petition for a writ of Certiorari, in an action instituted by this same petitioner in this Court for the October Term, 1954, bearing Docket Num-

ber 249. This Court in its allowance of the aforementioned petition for writ of Certiorari remanded the matter back to the Court of Appeals for the Third Circuit using the following language:

> "The petition for certiorari and for rehearing are respectively granted. The judgments are vacated and the cases are remanded to their respective Courts of Appeals for consideration in the light of Holland v. United States, Friedberg v. United States, Smith v. United States and United States v. Calderon, decided by this Court December 6, 1954.
>
> "We have not considered the merits of these cases, nor have we determined their relation to our recent opinions, supra, believing that reexamination by the Court of Appeals is desirable even in those cases remotely involving the principles laid down in the net worth decisions."

The Court of Appeals in the instant case upheld the conviction of the petitioner on the basis of evidence which it considered sufficient for conviction "without resort to the net worth theory". This reasoning was adduced despite the fact that the prosecution of the petitioner was limited to evidence arising solely and distinctly under the net worth-expenditure method by virtue of a Bill of Particulars filed in the cause and also despite the fact that this Court remanded the issue for further consideration in light of the new rules for determination of proper convictions under the net worth-expenditure method as outlined in the *Holland, Smith, Calderon* and *Friedberg* cases, supra.

In light of the apparent disregard of this Court's mandate for review by the Court of Appeals under the net worth-expenditures method and in light of the fact that the Court of Appeals may have overlooked the Bill of Particulars limiting prosecution of the petitioner in the original pleadings in the Court below, the petitioner requested that the Court of Appeals allow a rehearing regarding its opinion.

This petition for rehearing was disallowed without any comments.

The petitioner in his first petition for writ of Certiorari under October Term, 1954, No. 249, raised several questions of substantial importance. These were in addition to the net worth-expenditures method of prosecution and involved administration and enforcement of the Federal Internal Revenue Statutes and income tax laws.

These questions involved the practice of the special agents of the Intelligence Unit and Revenue Agents, when engaged in criminal fraud investigations, in not giving taxpayers the benefit of their constitutional privileges by not warning them, at their first interview, that whatever information they may give might be used against them in a criminal proceeding, are arising quite frequently among the various Trial Courts. As there are conflicts and disagreements and lack of uniformity in the lower Courts as to these questions it is respectfully submitted that it is now necessary for a clarification of the issues by this Court. *United States v. Guerrina*, 126 F. Supp. 610, 112 F. Supp. 126; *United States v. Wolrich*, 129 F. Supp. 528, 119 F. Supp. 538; and *Nelson v. United States*, 208 F. 2nd 505, 513.

Other reasons for granting the writ are those pertaining to the proper use and interpretation of the word "willfully" as used in the prosecuting statute, and the judicial determination relating to the conduct of the United States Attorney during the trial of the case.

It is contended by the petitioner that he did not have, and the government did not prove that he had, an evil motive or bad purpose in his actions. That the Court below should have approved a directed judgment of acquittal on this ground, alone. Further, that the Court below should have approved a request by petitioner for a mistrial and ordered a new trial due to the prejudicial conduct of the United States Attorney. That the trial Judge's admonitions to the jury were not sufficient and the evil influence upon the jury of these acts of misconduct was not removed by such judicial action as taken.

When this Court remanded the petitioner's matter for further consideration in light of its decision respecting the net worth-expenditures method for prosecutions of income tax evasions it did not rule as to the other questions presented by the petitioner in his first petition for a writ of Certiorari and accordingly the Court of Appeals restricted this petitioner in his brief and argument before it to only those matters which pertained directly to the net worth-expenditures method. As a result this petitioner has not been afforded his right to a decision regarding the other important and substantial questions as raised by him in his first petition for Writ of Certiorari.

In view of the fact that there are many conflicts and much disagreement and complete lack of uniformity in the lower courts as to these questions it is respectfully requested that this Court clarify the prerequisites necessary in order that a standard be set up for the future regarding issues of this kind.

Still further, the petitioner contended in the Courts below, that it was a matter of law for the trial judge to decide if the various sums of money given to petitioner were gifts or otherwise. *Bogardus v. Commissioner,* 302 United States 34.

QUESTIONS PRESENTED FOR REVIEW.

This case, an income tax evasion prosecution based on unexplained increases in net worth, poses a situation which has been thoroughly and exhaustively determined by this Court in the *Holland, Smith, Calderon* and *Friedberg* cases. The aforementioned cases set forth a measuring rod which was to be applied for all prosecutions by the Government on income tax evasion where the Government used the so-called net worth-expenditures method of proof. The measuring rod evolved pertinent prerequisites as follows:

a. The Government must establish a true and definite beginning point for each of the taxable years involved.

b. There must be sufficiency of evidence to warrant a submission of facts to a jury.

c. There must be a substantial evasion before there can be a submission of the facts to a jury.

d. The circumstantial chain of evidence must be accompanied by corroborative evidence which is direct and independent.

e. All of the evidence must be sufficiently strong enough to prove the offense beyond a reasonable doubt.

f. Extra-judicial admissions when relied upon by the Government as the prerequisite for its corroborative evidence must be an admission which has been obtained voluntarily after due and precise warning under the Fifth Amendment to the United States Constitution.

g. Extra-judicial admissions when used by the Government must be corroborated by independent evidence brought forth by the Government.

h. The direct evidence for corroboration of the circumstantial evidence in a net worth-expenditures method prosecution must be evidence which is relevant to the circumstantial evidence and not such evidence which is only subject to a prosecution on the theory of a direct evasion.

i. The independent evidence for corroboration must be evidence which is of a nature sufficient in itself to be the subject of an indictment under the income tax laws, and this evidence must be sufficiently clear to establish willfulness on the part of the taxpayer to evade payment of income tax.

j. Was there sufficient evidence to support the Court below in its refusal to grant defendant's motion to suppress the use as evidence against defendant the net worth statement, records and oral admissions given to and made to Special Agent Gerson and Internal Revenue Agent Blackman at and between their first two conferences on November 6, 1951, and in January, 1952?

k. Should the Court below have granted petitioner's motions for withdrawal of a juror, which motions were based upon the United States Attorney's prejudicial remarks and conduct?

1. This Court having remanded the petitioner's case to the Court of Appeals for the Third Circuit for reconsideration in light of its decisions in the *Holland, Smith, Calderon* and *Friedberg* cases, should the Court of Appeals have ignored this Court's mandate and rendered its opinion without resort to the net worth-expenditures theory and more particularly was it not bound to render its opinion solely with resort to the net worth-expenditures theory in light of the uncontradicted fact that the Government limited itself to the net worth-expenditures theory by filing its Bill of Particulars based upon that method.

STATUTES AND CONSTITUTIONAL AMENDMENTS INVOLVED.

Section 145 (b) of the Internal Revenue Code, 26 U. S. C. Section 145 (b).

This section provides: "Any person required under this chapter to collect, account for, and pay over any tax imposed by this Chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any per-

son who wilfully attempts in any manner to evade or defeat any tax imposed by this Chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution.

The Fourth Amendment to the Constitution of the United States, provides as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and particularly describing the place to be searched, and the persons and things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 3614 (a) of the Internal Revenue Code, 26 U. S. C. A. section 3614 provides:

> "*Examination of Books and Witnesses*
>
> (a) To determine liability of the taxpayer. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a

return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the matter required by law to be included in such return, with power to administer oaths to such person or persons."

Section 3761 (a) of the Internal Revenue Code, 26 U. S. C. A. section 3761 (a) provides:

"Compromises

(a) Authorization. The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense: and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

28 U. S. C. A. 1254 (1) provides:

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF THE CASE.

This Honorable Court acting on a petition for a Writ of Certiorari as of October Term 1954 No. 249, relating to a decision of the Court of Appeals for the Third Circuit which affirmed a judgment of the United States District Court for the District of New Jersey, entered on May 19, 1953, convicting petitioner of alleged violation of Section 145(b) of the Internal Revenue Code, 26 U. S. C. A. 145 (b) on all five counts of the indictment, remanded the matter to the Court of Appeals for the Third Circuit for further consideration in light of the recent decisions rendered by this Court on the 6th day of December, 1954. The Court of Appeals again affirmed the decision of the District Court of New Jersey by its opinion filed on the 6th day of May, 1955. It denied a petition for rehearing by its order filed the 24th day of May, 1955.

The indictment of petitioner was found by a Grand Jury of the United States District Court for New Jersey on or about September 11, 1952, and entered of record in the Court Records on September 17, 1952.

The government filed a Bill of Particulars indicating its case was based upon the net worth—expenditures method in arriving at the petitioner's correct taxable income.

The jury disagreed in the first trial of defendant and on April 20, 1953, the cause came on for a second trial before Honorable Phillip Forman, Chief District Judge and a jury at Camden, New Jersey. At the beginning of the trial petitioner's counsel moved for suppression of evidence procured by the government's agents from the petitioner in violation of his constitutional rights as provided by the Fourth and Fifth Amendments. The motion was ordered "Held" by the Court and the trial proceeded.

During the government's presentation of its case, the petitioner, through his attorney, moved, on various different

occasions, for a mistrial, based upon the actions and statements of the United States Attorney. After admonishing the United States Attorney on these occasions, the Court refused to grant a mistrial.

Also, during the prosecution of the government's case, the Petitioner objected to the admission of the government agents' testimony and use of petitioner's net worth statement, and at the close of the government's case, petitioner moved again for a suppression of evidence and for a directed judgment of acquittal which were denied by the Court.

During the petitioner's presentation of his defense, his attorney, at least twice, moved for a mistrial, due to the United States Attorney's conduct, which was denied by the Court.

After the end of petitioner's case his attorney again moved for a suppression of evidence and for a directed judgment of acquittal, which were denied by the Court. Petitioner's attorney also asked for a mistrial, due to the United States Attorney's remarks in his summation to the Jury, which were detrimental and prejudicial to petitioner, which was denied.

Petitioner was found guilty on all five counts and sentenced to jail for a year and a day on each of them, the sentences to run concurrently.

The petitioner during the period involved was employed as an executive clerk of the New Jersey State Senate when it was in Session and also did public relations work and sold radio advertising time. The latter activities were conducted from his home and by automobile. Petitioner had no accounting or tax experience.

Shortly before November 6, 1951, Special Agent Gerson of the Intelligence Unit, Bureau of Internal Revenue, United States Treasury Department, was assigned by his superior to make a criminal investigation of the income tax returns of petitioner for the taxable years 1946 to 1950, inclusive, based upon allegation of evasion of income tax. Special Agent Gerson arranged for an interview at the Internal

Revenue Agents' office in Atlantic City, New Jersey, with petitioner for November 6, 1951, and notified him or Mrs. Burdick by telephone, that it was not necessary for petitioner to bring in any records at that meeting, it being just an informal meeting.

The petitioner appeared before Special Agent Gerson, as arranged, together with Mr. Leonard Willets (a former Internal Revenue Agent) who had assisted petitioner in making out his income tax returns. Special Agent Gerson introduced himself to them, stating he was a special agent attached to the Intelligence Unit in Philadelphia, and that petitioner could answer any questions he wanted, or he could refuse; that anything petitioner cared to give him would be voluntary. Petitioner offered to cooperate with the Bureau in any way he could. Special Agent Gerson did not tell him he was engaged in a criminal investigation or that any information he gave him might be used against him in a criminal proceeding.

Petitioner had with him, at this meeting, his bank statements and cancelled checks for all the years involved and turned them over to Special Agent Gerson at his request. The cancelled checks indicated the persons, banks, companies, and corporations with whom he did business; his stock brokers, his and Mrs. Burdick's real estate and mortgage transactions; and his personal and business expenditures.

Special Agent Gerson questioned petitioner as to what records he kept and petitioner told him he didn't keep any formal records. That he did, however, keep memorandum and notes which he destroyed at the time he filed his return or shortly thereafter. Mr. Gerson then asked him for a net worth statement which would show his net worth as of January 1, 1946, and December 31, 1950. Petitioner, together with Mr. Willets, prepared such a statement and gave it to Mr. Gerson on November 21, 1951. The statement was headed "Lester H. Burdick" and at the bottom of the statement and above petitioner's signature was typed "The above statements reflect my net worth as of January

1, 1946 and December 31, 1950." It was sworn to by Petitioner. It was introduced in evidence by the government over objection as "Exhibit G-6" and the government based its case upon it.

There were only seven items of assets in the statement. One as to cash, two as to life insurance, and one each as to a savings account, securities and an auto. The items in dispute are as to cash currency on hand, life insurance in Mrs. Burdick's name, securities being United States War Savings Bonds in the name of Lester H. and Irene L. Burdick, and real estate in Mrs. Burdick's name.

There was an item of "cash" as of January 1, 1946 in the amount of $5,888.25, of which $1,888.25 was the balance of a bank account. The balance of $4,000.00 was what petitioner told the government agents in their examination of him he had at home and saved in prior years. The government did not admit this cash of $4,000.00 at the time of indictment but did accept that the petitioner had it at the time stated by him, when the trial commenced. It did not present any independent evidence of what cash currency the petitioner had or could have had on hand as of January 1, 1946.

The listed item of life insurance which was in the name of Mrs. Burdick was included by the Agents because petitioner had listed it. The agents did not verify this item or the life insurance items of petitioner. They accepted his statements and at the trial no independent evidence of them was presented by the government.

The item of United States War Bonds was not listed by the petitioner in his net worth statement, although he did list securities at $3,000 for a starting point. The agents disallowed this item but charged petitioner with war savings bonds purchased in 1946, 1947 and 1948 and sold in 1948. The agents testified they did not know who purchased these bonds but they received a list from the United States Treasury Department in which they were listed in the names of Lester H. and Irene L. Burdick. Further that the

bonds had been sold in 1948 at the Guarantee Trust Company, Atlantic City, being endorsed by Lester H. Burdick and the check for the proceeds being in petitioner's name, endorsed by him, and deposited in his bank account.

George Oberholtzer, a witness for petitioner, testified at the trial that he was an employee of the Post Office in Atlantic City and that Mrs. Burdick had purchased these bonds from him and had the bonds put in both names on his advice. The government did not present any other proof as to the purchase and ownership of these bonds.

The listed item of $1,750.00 for real estate in the starting point was a lot of land petitioner had purchased in 1944 and given his wife as a gift. The deed was in her name and so recorded. It was sold on July 3, 1948 for $5,500.00 and reported by petitioner and his wife in their 1948 joint income tax return.

The listed item of real estate, $22,500.00 in 1948 in the government's net worth is for the Burdick home purchased on June 15, 1948. The deed for this property is in the name of Irene L. Burdick and is so recorded. Petitioner stated it was paid for by the sale of his wife's war savings bonds and lot plus a $15,000 mortgage executed by both of them. Petitioner had also borrowed at this time $3,000.00 from a bank which funds were also available.

The government offered no independent evidence of the ownership of the life insurance, bonds and real estate but depended on petitioner's extra-judicial admissions for proof of same. The revenue agent stated he put them in petitioner's net worth as petitioner had included them in his net worth statement.

Petitioner testified he believed he was filing a joint net worth statement because Special Agent Gerson told him to "put everything in" and also because he and his wife had filed joint returns in 1948 when the lot was sold, and had filed joint returns in 1949 and 1950.

Petitioner included in his net worth statement as a liability as of December 31, 1950, a "loan payable" of $1,000.

This being for money borrowed from a friend and which was lost on bets at a race track. The government agent disallowed the loan stating it was a gambling loss and not an allowable deduction.

Petitioner testified that he had informed the agents during his examination that his mother died in late 1946 and in going through her trunk in early 1947, he found $1,600.00 which he kept and used. Also that his wife had money of her own at home. The agents ignored these items and never questioned Mrs. Burdick or attempted to prove Mr. Burdick had not received any inheritances.

Petitioner had informed the government's agents, during their investigation, that he had received some monies from various persons which he had considered as gifts and did not, therefore, report them as taxable income. The agents did not investigate the correctness or falseness of these transactions or their true nature.

ARGUMENT.

The Government's Net Worth Statement including its Starting Point was Incorrect.

This Court in the four net worth cases aforementioned has pointed out dangers that must be consciously kept in mind in order to insure adequate appraisal of the specific facts in individual cases and concluded the net worth theory involved something more than the ordinary use of circumstantial evidence in the usual criminal case. That careful study indicates the method is so fraught with danger for the innocent that the court must closely scrutinize its use. *U. S. v. Holland,* 348 U. S. 121.

THE SMITH AND CALDERON CASES.

In the *Smith* case this Court deals with the government's use of extra judicial statements made by the accused taxpayer.

The Court states that the first issue is whether the requirement of corroboration may be properly applied to the crime of tax evasion and then decided that it did. That it chose to apply the rule, with its broader guarantee, to crimes in which there is no tangible corpus-delicti, where the corroborative evidence must implicate the accused in order to show that a crime has been committed. It cites the case of *Warszower v. United States,* 312 U. S. 342, and other pertinent cases.

The Court further states that the next problem presented is whether the statement here involved the opening net worth must be corroborated. It then holds that although this statement was part of a document which may have admitted an understatement of taxable income, one of the elements of the crime of tax evasion, still it is clear that the statement is not a confession admitting to all of the elements of the offense.

This Court also held that the corroboration requirement applies to mere admissions. Particularly applicable to such statements, at least, where made after the fact to an official charged with investigating the possibility of wrong doing, and the statement embraces an element vital to the government's case.

Two other questions also arise in the *Smith* case that are somewhat identical to questions at issue in the *Burdick* case.

In the *Smith* case the petitioner contended that his net worth statement should not have been admitted in evidence because it was procured pursuant to an understanding between petitioner and a government agent that the case would be closed and the petitioner granted immunity. Petitioner's accountant testified that the "agent agreed to

'close the case' " if the net worth statement and a check to cover the tax deficiency were forthcoming; otherwise he would not have furnished the agent with the statement. The government agent testified that he was aware of no such understanding and that he had made no promises to close the case.

Petitioner presented a motion to suppress the evidence before the trial and during the course of the trial which were denied. The trial judge did, however, submit the issue to the jury with the instruction that they were to reject the statement, and all evidence obtained through it, if trickery, fraud or deceit were practiced on petitioner or his accountant.

In the *Burdick* case petitioner by his attorney, moved to suppress evidence including the net worth statement allegedly obtained from him by the government agents by not warning him he was a subject of a criminal investigation and misleading him into believing he was only being examined for civil tax liability. Here the trial judge denied the motion and did not present the issue to the jury as to whether or not the government agents had used trickery, artifice, deceit or fraud in procuring such evidence from the appellant taxpayer and if so, it should not be used.

In the *Smith* case this Court holds that the issue of fraud or deceit on the part of the government agent was properly submitted to the jury.

The other related question involved in both cases is that based upon confessions and admissions.

In the *Smith* case after stating the general rule that an accused may not be convicted on his own uncorroborated confession, Justice Clark goes on to say that "its purpose is to prevent errors in convictions based upon untrue confessions alone, *Warszorver v. United States,* 312 U. S. at 347; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be un-

reliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, *Bram v. United States*, 168 U. S. 532, 542, 543; *Wilson v. United States*, 162 U. S. 613, 622-623; further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be 'involuntary' within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the Courts, the police and the medical profession recount a number of false confessions voluntarily made. Note, 28 Ind. L. J. 374. These are the considerations which justify a restriction on the power of the jury to convict, for this experience with confessions is not shared by the average juror. Nevertheless, because this rule does infringe on the province of the primary finder of facts, its application should be scrutinized lest the restrictions it imposes surpass the danger which gave use to them.

Here in the *Burdick* case petitioner was the subject of a police investigation, giving statements in the rooms of the investigating officers and being required to give information of years past and which was hard to recollect, but being held to the correctness of it. He was not allowed to correct any statements. That unquestionably petitioner was under strain and was trying to establish the truthfulness of his tax returns. He was also misled by the special agent as to the criminal purpose of his investigation. His statements to the agents as to his cash on hand and the purchase of bonds certainly indicates his strain and confusion. These items surely needed correction and the statements should not have been used against him as a basis for a criminal prosecution, although the agent had promised and agreed to let him do so at a later date.

The issue in the *Calderon* case is similar to the question

presented in the *Smith* case on the corroboration of the taxpayer's extra judicial statements concerning his "opening net worth" particularly as to "cash on hand". The Court stated, as in *Smith v. United States,* the circumstances surrounding defendant's admissions cast some doubt on their reliability. The statements were made by a taxpayer anxious to cooperate with the government in the hope of limiting civil liability and avoiding criminal prosecution. The oral statement, with its "in the pocket" terminology, is certainly not clear. And the government's own witness, the defendant's accountant, testified that he had not verified the particular figures in the written statement when it was referred to him by defendant. Under these circumstances, the Supreme Court stated, the trial judge and reviewing Courts should exercise great care in determining whether the statements of the accused were corroborated."

Also in the *Calderon* case this Court refers to the taxpayer's testimony at a prior trial so therefore it is believed appellant Burdick is entitled to refer to evidence, produced or the lack of evidence produced in his first trial.

It should be noted that appellant's accountant stated he had not verified the items in the net worth statement given to the agents and used by them for prosecution of defendant.

The Petitioner contended in the lower court that in light of this Court's order, the Court of Appeals' jurisdiction was actually de novo and that all the evidence presented at the original and second trials and any other evidence not presented at those trials, but which necessarily must be scrutinized and should be given careful consideration by the Court. As an example the statements, letters and affidavits of third parties, some of which were originally presented by the petitioner through his attorney to Special Agent Gerson and considered by petitioner and the donors to be gifts and not taxable income, monies given to petitioner for election purposes, business entertainment and travel, other types of expenses, funds loaned by and owed to petitioner by others, funds borrowed by and owed by petitioner to others,

and as to cash belonging to petitioner's wife and cash left by petitioner's deceased mother. All of the aforementioned documents had explanations of overages under the net worth theory. Most certainly they were leads and reasonable explanations of overages under the net worth theory which heretofore had not been scrutinized by the Lower court. The petitioner respectfully requests that this Court read these documents in view of the fact that the Circuit Court of Appeals failed to so do when in its opinion it decided this matter without resort to the net worth theory.

COMPARISON OF HOLLAND AND BURDICK CASES.

In the *Holland* case, Justice Clark states * * * while sound administration of the criminal law requires that the net worth approach—a powerful method of proving otherwise undetectable offenses—should not be denied the government, its failure to investigate leads furnished by the taxpayer might result in serious injustices. It is, of course, not for us to prescribe investigative procedures, but it is within the province of the Courts to pass upon the sufficiency of the evidence to convict. When the government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which if true, would establish the taxpayer's innocence. When the government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the government's case insufficient to go to the jury. "This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused being forced by the risk

of an adverse verdict to come forward to substantiate leads which he had previously furnished the government. It is a procedure entirely consistent with the position long espoused by the government, that its duty is not to convict, but to see that justice is done."

Petitioner believes and therefore contends that the above statements of Justice Clark applies to and is the crux of this case.

On April 15, 1952, at an interview with the two revenue agents, petitioner told them that as of January 1, 1946, he had cash at home in the amount of $4,000.00 and when asked about having the United States bonds in the amount of $3,000.00 on the same date he told them they must have been bought later on, that he had the money at home to buy them. This cash being other than the $4,000.00 also mentioned and which he had accumulated over the years.

Mr. Burdick also told the agents at this interview that he had gotten between fifteen hundred to two thousand dollars in gifts from different people around the Legislature for favors done them in the years involved. Further that his mother died in December 1946 and in January, 1947 while going through the effects of her trunks left in his home he found between $1,600.00 and $1,700.00 which he kept and used.

On or about April 30, 1952, petitioner's attorney, Robert M. Taylor, Esq., mailed to special agent Morris Gerson statements and an affidavit received from various persons stating they had given Mr. Burdick various amounts of money and explaining why they had done so. Also mailed with these papers was a transmittal letter referring to such payments, which is attached hereto as Exhibit A. A substantial portion of these payments being regarded as gifts by Mr. Burdick and the donors.

Later in the processing of this case by the government and while the matter was under examination by the criminal section, Tax Division, of the United States, Department of Justice, petitioner's said attorney furnished to the gov-

ernment's attorney many more statements and affidavits (see Exhibit B), including the affidavits of Mrs. Irene L. Burdick that she was with her husband, Lester when he found the $1,600.00 in his mother's trunk; also that she had the sum of $3,800.00 in cash currency at the end of year 1944; also presented to the Justice Department was a brief prepared by appellant's said attorney which included, referred to, and described all the moneys allegedly paid to Mr. Burdick as gifts, refunds, insurance claims, sales of assets, cash from his mother and as to cash held by his wife, as well as details of the purchases of real estate. Excerpts of said brief are attached hereto as Exhibit B. The addresses of all these third parties were given to the government's agents and attorney, so that they could be interviewed.

The Court's attention is called to the proceedings in the first and second trials of petitioner. In the first trial the government did not produce any of the persons referred to in the statements and affidavits and completely ignored them. They were called by the petitioner in his behalf. In the second trial the government called most of these witnesses as its witness and it is seriously contended by the petitioner that whereas these witnesses were called by the government as its witnesses, the government is bound by their testimony to the effect that they had given Mr. Burdick gifts and presents.

Special agent Gerson and Revenue Agent Blackman each testified that although they had knowledge of the filed documents and proof of cash payments, they ignored such information given the government by the petitioner. That they did not attempt to verify or corroborate by independent evidences the amount of cash currency Mr. Burdick had on hand at January 1, 1946, the loan receivable of $500.00 owed by Frederick Cronk to Mr. Burdick; the sum of $1,600.00 found by petitioner in his mother's trunk; the actual purchaser and owner of the government bonds in question; the real estate and life insurance; the liability of Mr. Burdick for $1,000.00 to Dr. Furey; and of course of the gifts and other non-taxable receipts.

Neither did the said agents attempt to negative these items in any manner. They did not question Mrs. Burdick as to her holdings of cash, real estate, bonds, other assets and income although she was available for interview and had filed an affidavit with the government regarding her cash currency available at the end of 1944 and Mr. Burdick had told the agents she had moneys of her own; they did not communicate with Mr. Cronk or Dr. Furey; they did not attempt to contact petitioner's sister, wife or other relatives as to the possibility of his mother having or not having $1,600.00 at the time of her death, nor did they examine and produce any surrogate's records showing whether or not there was a probated estate of appellant's mother.

Although Agent Blackman testified he examined the photo-films of the Treasury bonds in question he did not go to the Atlantic City Post Office, which is shown on the bonds to be the issuing agent thereof; to discover if he could, who had actually purchased the bonds.

Further, as a revenue agent, he should have actually broken down petitioner's expenditures as he must have known Mr. Burdick used his automobile in his business and would have been entitled to many more deductions as business expenditures and depreciation rather than as personal expenditures charged to him.

It was on the basis of these facts that petitioner's attorney moved the Court for a directed judgment of acquittal after the government had rested its case in the second trial. Certainly all of these explanations by the taxpayer Burdick to the agents were reasonable explanations and easily susceptible of being checked and proved or disproved.

What the government agents actually did was to throw out any evidence that was helpful to petitioner's case and to use only the evidence that was helpful to their case. They chose the favorable portions of the available evidence and discarded, ignored or ruled out unfairly that evidence which did not bolster the government's position.

It is contended by the petitioner that if these leads had

been checked the truthfulness of them would have been established and the case would have been found by the trial judge to be insufficient to go to the jury, particularly in the light of the decision in the *Holland* case. That he was forced to carry the burden of proof which was actually the government's burden and should not have shifted to him.

The burden of proof in this case was undoubtedly shifted to the petitioner and he was unlawfully compelled to come forward with evidence which lent support to the government's case, but in effect was evidence which the trial judge should have accepted as being true by virtue of the fact that the prosecution saw fit to use same for the purpose of establishing a prima facie case.

LACK OF CORROBORATION AND PROOF.

As to the government's net worth statement, its agents failed to verify and corroborate the petitioner's

(1) Cash currency on hand as of January 1, 1946, and the sources of such cash.

(2) Ownership of the three life insurance policies, one being in the name of Irene L. Burdick.

(3) The purchase and ownership of the government bonds.

(4) The ownership of the real estate.

(5) Mrs. Irene L. Burdick's cash and other asset position.

(6) Frederick Cronk's loan payable to Mr. Burdick which was made in 1945 and repaid in 1946.

(7) Petitioner's debt of $1,000.00 to Dr. Furey and gift of $1,500.00.

(8) The finding of $1,600.00 by petitioner of his mother's money after her death.

The government used and depended on petitioner's extra judicial statements for the prosecution of its case without corroborating them by independent proof. Also, the government agents failed to give petitioner all proper credits for his business expenditures. They allocated substantial business expenditures to him as personal expenditures, which increased his alleged unreported income and additional taxes. Revenue Agent Blackman allowed the amounts claimed as deductions for business expenses in petitioner's returns instead of breaking down and arriving at the correct deductions which would have been substantially favorable to appellant. Particularly so as the taxpayer had turned over to him all his cancelled checks and explained the disbursements to him.

NECESSITY FOR ACCURACY OF OPENING NET WORTH STATEMENT.

According to the *Holland* decisions an essential condition of a net worth case is the establishment, with reasonable certainty, of an opening net worth, to start as a starting point from which to calculate future increases in taxpayer's assets. As stated in the *Holland* case "The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset."

Here in the *Burdick* case that is one of the issues, but another issue is that the government's net worth contains assets of others, specifically his wife.

The failure of the government's agents to corroborate the correct amount of cash appellant had on hand at the starting point is sufficient to make the government's case fall. The government did not introduce any testimony to indicate the amount of cash currency appellant had or could have had as of January 1, 1946. For the trial they just accepted his statement that he had $4000.00 on hand and that

this money had been given to him by a man named Henry McSweeney. They did not try to verify or negate it.

It appears from the testimony of the government's witnesses petitioner may have had more cash currency on hand than the $4000.00 as testified by him. The agents testified he told them he had other cash besides the $4000.00 at his home and David Kent testified he gave petitioner $500.00 at Christmas time, 1945 (N. T. 1302).

Petitioner also told the government's agents his wife had cash of her own on hand as of January 1, 1946, but they did not attempt in any way, to corroborate or negate the correctness of it.

It is submitted that the government did not definitely ascertain the petitioner's correct starting point of net worth, although the sources to do so were available and as a result thereof, they cannot use the extra-judicial admissions of the appellant to obtain a conviction against him. They had not proved the corpus delicti or any substantial portion of it.

The petitioner's attorney's "9th" Point for charge requested, "In this type of case where the government relies upon what is known as the net worth-expenditure method, the government must (1) establish at its beginning point the defendant's true net worth; (2) it must also establish through convincing evidence that the expenditures made by the defendant in each year came from taxable income; (3) it must so far as possible negative all items of non-taxable income received by the defendant. If you are convinced from the evidence that the government agents had information from the defendant or otherwise, respecting the so called non-taxable income, and that the government agents failed to make a reasonable investigation or failed to make any investigation to ascertain whether said information was correct, and whether said items should be eliminated from the computations as non-taxable income, then you must disregard the testimony of the government agents in this respect and I so charge you."

This point for charge is close on the track of Justice Clark's language and if the words "then you must disregard the testimony of the government agents in this respect" were replaced with Justice Clark's language, to wit, "and therefore, should be considered as true and the government's case is insufficient to go to the jury," we would not now be arguing an appeal from a conviction.

The Court's attention is called to the government's Bill of Particulars filed in the *Burdick* matter (N. T. 10a). It indicates the net worth increase for year 1947 to be in the amount of $7701.46 (a typographical error calls it "net worth increase in assets) whereas Revenue Agent Blackman in his calculations (N. T. page 211a) uses the amount of $9174.46 making a difference of $1473.00.

It is contended by Petitioner that the government must use the amount stated in its Bill of Particulars of $7701.46 and not the greater amount. By using this amount the appellant's alleged unreported taxable income would be reduced by $1473.00 and the tax substantially reduced in turn.

In 1950 the Revenue Agent disallowed Petitioner a loan payable liability of $1000.00 simply because he lost the borrowed funds at the race track betting on the races. It is contended by Petitioner that the agent's reasoning is incorrect and he is entitled to that credit which would reduce his alleged unreported income for that year and in turn his tax. It cannot be charged to him as an expenditure as the government is held to its stated amount of personal expenditures in its Bill of Particulars.

As to Petitioner's lack of and the destroying of his records of taxable income there were not many records to keep. He testified he kept monthly memoranda of his commission receipts which he destroyed shortly after he filed his tax return. The government, after investigation, has not shown any of his commissions to be wrongly stated. They must have examined the Radio Companies' books with whom he did business and he had W2's for his other employment.

There is no statute or section in the Internal Revenue

Code that directs a taxpayer to keep records for any set length of time. Revenue Agent Blackman told Petitioner at their interview on April 15, 1952, that books and records should be kept for three years. Using that figure appellant would have only had to produce his records for years 1949 and 1950. He did have and gave to the agents, all the records pertaining to real estate, insurance, automobiles, shares of stock, bank statements and cancelled checks.

As to getting information from the Internal Revenue service at its office counters, very few taxpayers would ever think to ask the name of the person from whom he was obtaining information. If appellant thought he had received gifts and that they were not taxable as income, he had no need to keep records of them.

As to his wife's life insurance, it had to be on her life and she had the right to change the beneficiary, as to her real estate he had a lawful right to give her a gift of the lot in question and when it was sold in 1948 they declared a long term gain in their 1948 tax return; the Osborne Avenue house was purchased with funds mostly obtained from the sale of her lot, bonds and mortgage money. All of these items were of public record. As to the Prudential Company mortgage application, appellant has denied he ever talked to the Company's agent who testified he received the information from him over the telephone. The agent admitted he did not know Mr. Burdick in Court. The application is unsigned which is peculiar for a company as meticulous as the Prudential Insurance Company; it indicated the purchase price of the property to be $25,000.00 whereas it was $20,000.00, it also indicates life insurance of $15,000. with the Penn Mutual, whereas it was much less ($10,000) and his annual income as $10,000.00. It does not say taxable income. This information could have been given by another person trying to assist Mr. and Mrs. Burdick in getting a mortgage loan.

It is contended that inasmuch as the insurance agent could not identify Mr. Burdick and as the application was

unsigned, it should have been suppressed as evidence and not be permitted to be used against him in a criminal trial. The agent only assumed it was Mr. Burdick.

The constitutional question involving the Fifth Amendment and necessity for government agents to advise taxpayer he does not have to be a witness against himself in a criminal proceeding.

In the *Calderon* case Justice Clark states "* * * Respondent also signed a written statement admitting to the same opening cash on hand. This document contained the overall net worth computation relied on by the government at the trial. The government's evidence tended to show that it had been signed by the respondent *after the usual warning* and after he and the agents had worked over the statement, item by item, for some eight hours."

It is submitted by Petitioner that as this Court uses the words "after the usual warning" in the *Calderon* case he is entitled to argue the point that the trial judge erred in his refusal of Petitioner's motion to suppress certain evidence obtained from him by the government's agents during their investigation of him; and used by them for his prosecution.

The use of the words "after the usual warning" by the Supreme Court is apparently similar to the expression by the Court of Appeals in the case of *Pollock v. United States*, 202 F. 2nd 281-284, to wit, "after due warning of their constitutional rights". It is contended by the appellant that the use by the Supreme Court of the expression "after the usual warning" makes it necessary for government agents in a criminal investigation to warn the person under investigation of his constitutional rights provided by the Fifth Amendment, that he does not have to be a witness against himself. Otherwise the failure to do so forecloses the use of any evidence obtained without first having given the warning.

It is the contention of the defendant that the information the government agents got from him when he turned over his bank records, cancelled checks, brokerage records and miscellaneous records, as well as his oral admissions made to them during this period, as well as the net worth statement signed by him should not have been allowed in evidence by the trial Judge in his criminal case.

This contention is based upon two separate yet interrelated grounds. One is the constitutional guarantee in the Fourth Amendment to the Constitution of the United States against unlawful searches and seizures, and the second is the privilege against self-incrimination contained in the Fifth Amendment.

Special Agent Gerson testified that the purpose of his investigation of the taxpayer was a criminal investigation; to investigate an alleged evasion of income tax. That it is his department (Intelligence Unit) that recommends prosecution of taxpayers for tax evasion. That all he told Mr. Burdick at his first meeting on November 6, 1951, was that he was investigating his tax returns and whatever he told or gave him was voluntary. That he did not tell him that anything he would give to him would be used against him in a criminal prosecution; also, that he did not warn him at their second meeting (pp. 58a-62a). Further that he did not advise defendant of his rights under the Fourth and Fifth Amendments to the United States. That he didn't know the Fourth and Fifth Amendments; not in their exact wording.

The defendant believed that the government was just checking his returns and had gotten no warning from Special Agent Gerson or Agent Blackman that they were making a criminal investigation of his tax returns. That neither one warned him of his Constitutional Rights not to testify against himself. That on November 6, 1951, Mr. Gerson asked him several questions pertaining to his bank accounts, savings accounts, stocks, safe deposit box, real estate, insurance and as to where he got his money (pp. 418a-423a).

Inasmuch defendant was not warned of his constitutional rights he was misled by the government agents, particularly Special Agent Gerson, into turning over to him his various records for examination and giving him a net worth statement and other information as to his various financial and business transactions. He was under a misapprehension of the true facts of the case.

It is submitted that as defendant was misled into giving consent to the examination of his records; presenting a net worth statement, and giving other information to the agents, verbally, his action in so doing cannot be considered voluntary insofar as making available his records, net worth statement and transactions for the purpose of investigation to establish fraud for criminal investigation purposes. That they were obtained from him in violation of the Fourth Amendment and would be a violation of his rights under the Fifth Amendment. *Gouled vs. United States,* 225 U. S. 298, at page 305, states:

> "In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself, or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

To permit evidence to be obtained against a defendant by the means here employed (however innocently it may have been done in this case) would be to encourage overzealous and less scrupulous officers and agents of law enforcement agencies to chip away rights, guaranteed by the constitution to defendants by trick and artifice, to do what could not be done in court proceedings, i. e., compel a defendant to testify against himself.

In *Shinyu Noro vs. United States,* 148 F. 2nd 696, the court stated inter alia:

> "in the case of the truth, even though unlawfully discovered, as evidence in the prosecution of a crime is not prohibited by constitution or other statutes, but it is a Federal Judicia. policy not to allow agents and officers of the United States to break the law themselves and then use information so acquired to prosecute others."

In *Hanson vs. United States,* 186 F. 2nd 61, the Court, in calling attention to the defendant's contention of the violation of his constitutional rights under the Fourth and Fifth Amendments by failing to advise him of them stated, inter alia,

> "* * * at the time in question there is not evidence that a criminal prosecution was in contemplation. The government agent, in the performance of his duty, went to the defendant, advising him that he wished to check his income tax returns for the years in question. There is nothing to indicate that there was even any suspicion at that time that the defendant was guilty of a criminal offense. In these circumstances we think there was no occasion nor necessity for warning the defendant that any statements he might make or documents he might produce would be used against him in a criminal prosecution."

The principal factors referred to by the Court as being lacking and which by implication were necessary to sustain the plea of the Fifth Amendment are present in the instant case. Here, at the time the defendant produced his papers, net worth statement and other records and gave information, criminal prosecution was contemplated, whereas in the *Hanson* case, there was nothing to indicate that there was any suspicion that the defendant was guilty of a criminal offense. Special Agent Gerson testified that the purpose of his investigation was for criminal prosecution, that he had information that the defendant may have evaded payment of income taxes.

It is submitted that the Court of Appeals for the 8th Circuit would have reached a conclusion that the defendant was entitled to a warning before the information could be said to have obtained from the defendant without doing violence to his privilege under the Fifth Amendment.

The opinion of the Court of Appeals in the instant case cites the cases of *Montgomery v. United States*, 203 F. 2nd 887; *Powers v. United States*, 223 U. S. 303, 312, and *Wilson v. United States*, 162 U. S. 613, 623.

The *Montgomery* case appears to be in conflict with *Pollock v. United States*, 202 F. 2nd 281-284, decided by the same court but a few months prior to *Montgomery*.

In the *Pollock* case the court stated, page 284:

> "* * * In the present case, the government agents made a rather thorough independent investigation; and then, by repeated examination of the taxpayer under oath, and also of his wife, *after due warning of their constitutional rights*, traced their financial history back for many years, established their net worth at the beginning of the questioned period and excluded every source of increase of net worth other than taxable income * * *"

It appears that the *Montgomery* and *Hanson* cases depend on the *Powers* and *Wilson* cases.

It is respectfully submitted that these recent cases have a misconception of the facts in the two earlier cases. In the *Wilson* and *Powers* cases the defendants each testified before a United States Commissioner shortly after the crimes were committed. They may or may not have been advised as to their constitutional privileges but they were advised as to the crimes they were charged with.

In none of these income tax cases was the taxpayer made aware of the charges against him. It is contended, therefore, that the reason why the court did not consider a constitutional warning necessary was that the defendants were aware of the criminal aspects of the matters having been

told by the United States Commissioners of the charges against them.

In the *Wilson* case, page 616 in the statement of facts, it is related the Commissioner said, "that the statement was his (Wilson) statement as made and written down at the time; that he read the charges to Wilson and went on and examined him; and he answered the questions * * *".

In the *Powers* case, page 315, in the court's opinion it is stated "* * * It appears that Powers testified, being charged with illegal conduct concerning the distillation of spirits * * *." See *Bram v. United States*, 168 U. S. 532, 542, 543,

In the instant case the 5th Amendment was violated in that the petitioner at the time he submitted his so-called net worth statement to the Agent Gerson, did so with a complete and definite understanding that he was submitting a statement to show to the Agent his complete innocence respecting any tax evasion. At the time he submitted said statement, to which was attached a settlement sheet explicitly showing title to the real estate in his spouse's name alone, said statement was given only on the basis of showing the petitioner's innocence respecting any tax evasion.

Agent Gerson in eliciting said statement merely said that he was advising the petitioner that whatever he was giving him was voluntary. The Agent did not warn the petitioner that in answering this statement he would use same against the petitioner in a criminal prosecution.

The petitioner respectfully submits for the Court's deep consideration the fact that had he been properly warned he would have at least consulted with an attorney before submitting any evidence to the agent so that he would be clearly apprised of all of his rights under the Constitution.

The 5th Amendment to the Constitution of the United States clearly states that one is not compelled to incriminate himself; and that any statement given by an individual to any Agent of the United States Government must be a statement that is voluntary and he must be apprised if the Agent intends to use same for criminal prosecution. In

this case the evidence is very clear that the Agent did not warn the petitioner that he requested this information on the basis that he was proceeding with a criminal prosecution or that he was laying the basis for a criminal prosecution.

In view of the evidence the court below should have found that this statement was not a voluntary statement on the part of the petitioner and that he was not duly warned of his rights under the 5th Amendment.

The 5th Amendment to the United States Constitution clearly defines the prerequisites necessary for a confession to be used in a criminal prosecution. The applicable interpretation of the 5th Amendment to the instant case is the fact that the statement as given by the petitioner must not have been voluntary and that he was not advised that it would be used against him in a criminal prosecution. His giving of the statement was voluntary only to the extent that he believed and reasonably so, that he was submitting this information for the purpose of establishing his innocence of any willful tax evasion or that at best this statement would only lead to a civil assessment, if any.

Petitioner further contends that an examination of a taxpayer under section 3614 (a) of the Internal Revenue Code is in the form of and similar to an inquisition by a grand jury and as he was a subject of such an examination he was actually a defendant in a criminal case and entitled to a warning as to his constitutional privileges. *United States v. Lawn*, 115 Fed. Supp. 674. That until he was warned he could not waive his rights.

In *Falsone v. United States*, 207 F. 2nd 737, the Court stated "* * * The power granted to the commissioner of Internal Revenue by 26 U. S. C. A. No. 3614 is inquisitional in character and has been compared to the power vested in federal grand juries." *Bolich v. United States*, 67 F. 2nd 894, 895 (C. A. 2); *Brownson v. United States*, 32 F. 2nd 844, 848 (C. A. 8).

That under Section 3671 (a) of the Internal Revenue

Code, 26 U. S. C. Section 3671 (a) the Commissioner of Internal Revenue is permitted to compromise and settle any tax case, civil or criminal before it reaches the Department of Justice and after the case reaches the Department of Justice it can be compromised by the Attorney General.

In the *Holland* case in a footnote, it is stated, "This Court will formulate rules of evidence and procedure to be applied in Federal prosecutions where it appears necessary to maintain proper standards for the enforcement of the Federal Criminal Law in the federal courts." *McNabb v. United States*, 318 U. S. 332, 341.

Petitioner submits that as a matter of judicial supervision of the administration of criminal justice in the Federal Courts it should order and insist the "warning" be required in criminal investigations. Otherwise it is a violation of an American citizen's greatest right, that of personal liberty and privilege.

In light of the recent decisions of this Honorable Court respecting the Government's use of the net worth-expenditures method of proof in a prosecution involving income tax evasion we must perforce arrive at the following logical conclusions: the net worth-expenditures method is at best a hybrid system of accounting which can never be applied with complete accuracy, the Government when using this hybrid system can only do so by use of a highly circumstantial chain of evidence. This Honorable Court realizing the serious damage that this type of prosecution would inflict upon defendants, must establish a definite prerequisite to the effect that in addition to this highly circumstantial chain of evidence there must be independent evidence or direct evidence which is both relevant and corroborative to all the elements of the circumstantial chain of evidence before a Court should allow any of this evidence to go before a jury for its determination.

In the present case, somehow or other the Honorable Judges of the Court of Appeals were wholly convinced that because of so-called admissions by the petitioner that he

had actually received items of monies over a five year period which he had either by a mistake of interpretation of the law, or having been misinformed by people whom he considered experts, he had not paid a tax, believing that they were gifts. This belief on the petitioner's part was substantially proven by the greater majority of witnesses who testified in the Court below that when they gave these items of money to the petitioner they did so in the form of a gift and considered the money as gifts. Despite all of this, the learned Judges of the Court of Appeals, stated that on this basis alone the jury having been given the facts, must have decided that these items were not gifts and that the petitioner willfully evaded the payment of a tax on these items and based on these items alone the Court below decided that it was not necessary for them to resort to the net worth theory.

The dangerous situation that must arise from permitting a jury to pass upon direct evidence which taken by itself could never lead to an indictment and which taken by itself could never for one moment display a willfulness such as required under the Internal Revenue code, would not and should not be permitted to be that type of evidence which could be used as being corroborative to a highly circumstantial chain as spoken of in the net worth cases.

The petitioner respectfully calls this Court's attention to the lower court's reasoning concerning the fact that its opinion was based upon the admitted items of alleged gifts and in so doing stating that it would be academic for them to resort to the net worth theory in view of the admitted receipt of some $14,500.00 covering items of gifts by the petitioner. The Court below reasons that this amount of money was sufficient to sustain a conviction by the jury overlooking the fact that the jury had before it for consideration many items of monies covering five counts, one count for each year, and that in each year the jury had to consider as we stated before, items of monies received from various and sundry sources of income making up the Government's

charge of understatement of income amounting to a sum total of $33,000.00 of which $14,500.00 consisted of so-called gifts. The Court below reasoned that the jury must have found the petitioner guilty as to the items of gifts. How the Court below could justifiably reason in that manner this petitioner cannot fathom for if this line of reasoning were to go unchallenged and were to be used for future cases, we would then be permitting a Judge to substitute his thinking for that of the jury's for as in this case how does the lower court know whether or not the jury didn't consider the item of $14,500.00 as a genuine gift and maybe erroneously considered the circumstantial evidence as to the other net worth increase as items of money which the petitioner should have paid a tax on. More particularly the lower court's line of reasoning must be fallacious in that when one reads the trial Judge's charge to the jury respecting these items of gifts there would clearly be a miscarriage of justice by the jury if it considered for one moment that these items of gifts and the facts surrounding the same could lead by the wildest stretch of imagination to having been made with a willfulness to evade the payment of taxes.

This petitioner, as stated in his request for a rehearing before the lower court, reasoned that if the Court predicated its entire reasoning on these items of gifts alone, that at best they should have afforded him the opportunity of a new trial so that he could meet head on this allegation and properly defend himself as to willfullness of evasion solely because he misinterpreted the law regarding what was a gift and what was not a gift. The government could have amended its Bill of Particulars before commencement of the second trial of petitioner and by not doing so forfeited its right to any conviction based solely upon direct proof. Petitioner was not on notice to prepare a defense for that method of prosecution.

The petitioner calls attention to this Honorable Court of the fact that the lower court in rendering its opinion and doing so without resort to the net worth theory, violated

a fundamental principle of law in that it completely ignored a Bill of Particulars wherein the Government limited itself to prosecution of this case solely on the net worth-theory and expenditures method of proof. The petitioner relies upon numerous cases which have established the fact that where a Bill of Particulars is filed by the Government, the Government must limit all of its proof and confine itself to the Bill of Particulars. *U. S. v. Neff*, 212 F. 2d 297; *Land vs. U. S.*, 177 F. 2d 346; *U. S. v. Potson*, 171 F. 2d 495, 497; and *Bryan v. U. S.*, 175 F. 2d 223.

It is interesting to note further that the lower courts cited as authority for its opinion the case of *Watts v. U. S.* The petitioner distinguishes this case in that said case was a prosecution for tax evasion in the alternative on both the net worth and direct evasion and further the net worth was not raised on appeal.

The Court below should have granted petitioner's motions for withdrawal of a juror, which motions were based upon the United States Attorney's remarks and conduct.

It is fundamental that the defendant in a criminal case is entitled to a fair trial, and intemperate, abusive and over-zealous remarks by counsel for the government during the course of the trial, examination of witnesses, or the summation, are often sufficient ground per se to justify and demand the reversal of a judgment of conviction even though the trial Court is the only check upon any improper action of his. *Berger vs. United States*, 295 U. S. 78; and *Viereck vs. United States*, 318 U. S. 236, 248.

It is submitted that the United States Attorney in this case, overstepped the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense and unduly prejudiced the defendant to the jury; and that the advice by the Trial

Judge to the jury to overlook such actions and remarks was not sufficient to remove such prejudice. Defendant's counsel took objections to these various acts, moving for a mistrial, which were denied.

The record is replete with admonitions by the Trial Judge to the United States Attorney and motions for a withdrawal of a juror by defense counsel.

During Special Agent Gerson's testimony (pp. 68a-70a) defendant's counsel objected to Mr. Richman (United States Attorney) while sitting close to the jury prompting his assistant, Mr. Rutkowski; as a result the Court directed the United States Attorney to remain in his place at the counsel table and see that only one of the government attorneys registered objections. Mr. Richman asked the Court, "Are we going to have a lying down—" and the Court ordered him, "Don't provoke me."

During the presentation of some stipulations (pp. 94-95a) the United States Attorney disagreed to presentation of certain offered stipulations by defense counsel; he refused as Mr. Reiners stated "viciously" and the Court ordered him to content himself, that he would have an opportunity to answer him. Mr. Richman began to say "that is rather—" when the Court said to him "never mind, no remarks. Don't mumble them either. I didn't hear what you said."

And following the same (pp. 96a and 97a) when Mr. Reiners, defense counsel, was objecting to putting into evidence the defendant's bank records in which the Court was protecting him, Mr. Richman remarked, "Do I understand that the defendant, in other words is not willing to have his bank records made known to the jury." The Court ordered the remark stricken out, but defense counsel moved for withdrawal of a juror as it being prejudicial to defendant. The Court stated to Mr. Richman that this case had been tried once before at great length and had entailed the government in great expense and admonished him not to risk the withdrawal of a juror. That he wasn't going to do it at that time because he did not think the defendant had

been prejudiced. That his actions had kept on and he did not seem to know the cause of the mysterious mumblings.

During the cross-examination of Mr. Willits, defense counsel again called attention to the Court of the United States Attorney's mumblings (pp. 151a, 152a) and the Court directed him to deport himself as a lawyer should under the circumstances and not make any comment. Mr. Richman stated he did not make any comment to the Jury or anyone else. The Trial Judge stated that he hadn't said anything to the jury, but that he had made a comment, and if it wasn't directed to the jury or anybody else, then he made it to himself, and please try not to talk to himself and not to let it happen again.

During the testimony of Harry A. Sweeney (p. 175a), when Mr. Reiners objected to the United States Attorney's actions, Mr. Richman was directed by the Court to eliminate any further remarks after his rulings were made; and Mr. Richman replied, "We are getting at least to the point where I cannot say anything at all, but I will try."

During Mr. Harvey's testimony (p. 191a) Mr. Richman was directed by the Court please not to make a nuisance of himself. That if he was not going to make an objection, he should remain silent under severe penalty.

During interrogation of Mr. Grant, a government witness, as to defendant's purchase of a cadillac automobile, Mr. Richman, stated, "I am not going to quibble with this witness any longer. If counsel wants to conceal the fact * * *." This remark was ordered stricken out by the Court, but defense counsel moved again for withdrawal of a juror on account of prejudice to the defendant. The trial judge cautioned the jury that it should completely eradicate from its mind the remarks of the United States Attorney. The Court admonished Mr. Richman telling him that this was the third or fourth time that he had to deny a motion for a mistrial. That they now had four days and a great deal of preparation for trial, and on that account he didn't feel that a mistrial should be granted; that he had warned him

that a repetition of this kind of remark will find its reaction in the granting of a motion for a mistrial when made by defense counsel if he persisted in that kind of conduct (pp. 193a-195a). Mr. Richman replied that he did not have to sit there and take remarks that he was not conducting himself improperly because he was not. That the trifling objections being made to trifling remarks were an attempt to play up something out of nothing. That it was a deliberate plan and scheme to play up something out of nothing.

The Court told him that the remark that he had made was to imply that the defense counsel and the defendant wanted to conceal something. That it was uncalled for.

During the cross-examination of defendant, defense counsel made an objection and its United States Attorney exclaimed, "Correct me—he wants me instructed." Defense counsel again moved for withdrawal of a juror due to the conduct of the United States Attorney as it was prejudicial to the defendant. After a colloquy between the Court and Mr. Richman, he was directed to restrain himself and not persist in running the hazard of having to try the case all over again, which would be quite catastrophic.

Mr. Reiners called the Court's attention that Mr. Richman was not conducting himself properly in accordance with the rules of acceptable procedure. That he hadn't made any comment about it before, but sometimes during the course of his interrogation of witnesses, Mr. Richman had been standing back of the jury box, alongside the railing, close to Juror No. 7, and at other times he was wandering in the Court room when he was making an objection * * * that his objections being made were made in good faith and on well merited grounds.

Mr. Richman suggested to the Court that they were not made in good faith, but the Court ruled that they were.

Immediately thereafter, Mr. Richman made a comment saying that he disagreed with the Court. The Court again admonished him not to do those things; that he didn't want

to hear any more from him, not even a small whisper (pp. 431a-436a).

During the United States Attorney's closing speech to the jury, Mr. Richman stated that defendant didn't care where the money he got from David Kent came from; that, "he didn't care whether it came from the Archbishop of Canterbury or 'Longie' Zwillman."

Defense counsel moved for a withdrawal of a juror. That the two characters mentioned never appear in the testimony. That "Longie Zwillman" is a character of an unsavory reputation; and that the remarks were definitely prejudicial to the defendant. That it inferred an association between defendant and a personality which was detrimental by inference and by reference. The motion was denied by the trial judge who believed that his cautioning to the jury was sufficient to remove any prejudice (pp. 450a-452a).

CONCLUSION.

It is respectfully submitted that in consideration of the foregoing reasons the petition for a writ of certiorari should be granted by this Honorable Court.

JOHN H. REINERS, JR.,
ROBERT M. TAYLOR,
Attorneys for Petitioner.

GEORGE P. WALKER,
Of Counsel.

APPENDIX.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 11,135.

UNITED STATES OF AMERICA,

v.

LESTER H. BURDICK,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued February 7, 1955.

Before:

GOODRICH, KALODNER and HASTIE, Circuit Judges.

OPINION OF THE COURT.

(Filed May 6, 1955.)

By KALODNER, Circuit Judge:

This tax evasion case has been remanded to this Court by the Supreme Court of the United States for reconsideration in the light of Holland v. United States, 348 U. S. 121 (1954); Friedberg v. United States, 348 U. S. 142 (1954); Smith v. United States, 348 U. S. 147 (1954); United States v. Calderon, 348 U. S. 160 (1954).

In its order of remand the Supreme Court cited:

> "We have not considered the merits of these cases, nor have we determined their relation to our recent opinions * * * believing that re-examination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the net worth decisions." 348 U. S. 904, 906 (1955).[1]

The four Supreme Court decisions forming the basis of the remand contain an analysis of the net worth theory and a thorough discussion of the need for caution in reviewing convictions secured by this method. They also contain rules of limitation which must be observed in the attempt to establish guilt through net worth computations.

We are of the opinion that the conviction under review is fully sustainable without resort to the net worth theory. This being the case, it would constitute a mere academic exercise to reconsider the net worth features of this appeal in the light of the authoritative guidance furnished by the Supreme Court with respect to net worth prosecutions.

The government produced ten witnesses who testified

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[1] The Supreme Court took similar action with respect to nine other net worth cases, enumerated at 348 U. S. 904-905 (1954).

that the defendant, during the period covered by the indictment, had received from them sums of approximately $14,500.00. The defendant did not dispute receipt of these sums but contended he regarded them as gifts and therefore treated them as non-taxable. The issue of whether these sums were gifts and whether the defendant wilfully evaded income taxes in so treating them were issues that comprised a substantial part of the litigation in the District Court. In 214 F. 2d 768, 771-772 (1954) we considered the nature of these transactions and the bona fides of the defendant's treatment of them for tax purposes. This appeal presents no new material to alter our former judgment on this score, and consequently there is no need to dwell in detail on the contentions with respect to these questions.

The District Court charged that the government must "establish through convincing[2] evidence that the expenditures made by the defendant in each year came *from taxable income* (income subject to taxation)." (emphasis supplied). Since the only proof offered by the government as to the source of the defendant's allegedly unreported income consisted of the $14,500 receipts previously mentioned, the jury must have considered them in applying the standard formulated by the Court. It is clear that the jury could not, consistent with the charge of the Court, have returned a verdict of guilty unless it construed these receipts in accordance with the thesis advanced by the government. Thus, while the indictment was framed according to the net worth theory it is clear that the case as presented to

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[2] The use of the word "convincing" in the portion of the charge quoted did not suggest a standard in opposition to the usual phrase "beyond a reasonable doubt", for the latter phrase refers to a degree of persuasion. In both civil and criminal cases the jury must be "convinced". The difference lies in the degree of conviction required. Any doubt as to the jury's understanding of this phase of the charge is dissipated upon examination of the District Court's thorough instruction as to the nature of the government's burden which included the following: "If there remains in your minds a reasonable doubt as to whether the government has established **any one element** which is a necessary or an essential part of the offense you must acquit the defendant * * * The proof must be of such weight as to persuade your reasoning judgment beyond a reasonable doubt." (Emphasis supplied.)

the jury pivoted on the issue whether the receipts were non-taxable gifts or payment for services, qua gratuities, tips, etc.[3]

It is apparent therefore, that the defendant was convicted for wilfully failing to report approximately $14,500 as taxable income. The receipt of these amounts was admitted. Their taxability was established by overwhelming evidence. Accordingly, the net worth computations introduced at the trial are without relevance to this appeal.

One circumstance remains to be considered. The government in its indictment alleged that approximately $33,000 of taxable income had not been reported by the defendant. The specific income proof comprised $14,500. The variance is not fatal, for it is settled that it is not necessary to prove evasion of the entire amount alleged in the indictment. It is sufficient to prove that a substantial amount of tax liability has been wilfully evaded. Watts v. United States, 212 F. 2d 275 (10th Cir. 1954); Sasser v. United States, 208 F. 2d 535 (5th Cir. 1953); Tinkoff v. United States, 86 F. 2d 868 (7th Cir. 1937), cert. denied 301 U. S. 689 (1937).

For the foregoing reasons the judgment of the District Court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[3] The defendant contended he had been advised by the local Internal Revenue Office in "1940-1943 or 1944" that these receipts were not taxable. With respect to this contention the Court charged: "If you conclude his failure to report these items was due to an honest, even though mistaken opinion that these items were not subject to tax, then you must eliminate them from your consideration * * *."

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 11,135.

UNITED STATES OF AMERICA,

vs.

LESTER H. BURDICK,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

PRESENT:

GOODRICH, KALODNER and HASTIE, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,

May 6, 1955. Clerk.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 11,135.

UNITED STATES OF AMERICA,

vs.

LESTER H. BURDICK,

Appellant.

[ORDER] SUR PETITION FOR REHEARING.

Present:

GOODRICH, KALODNER and HASTIE, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court,

KALODNER,
Circuit Judge.

Dated: May 24, 1955.

EXHIBIT "A."

Mr. Morris Gerson
Intelligence Unit
U. S. Treasury Department
N. W. Ayers Building
W. Washington Square
Philadelphia, Pennsylvania

Re: Lester H. Burdick
12 N. Osborne Avenue
Margate City, New Jersey

Dear Mr. Gerson:

I have enclosed, herewith, the following:

1. Statement from Dr. David S. Steinbaum, Bayonne, New Jersey, that in October, 1950, he paid Mr. Lester Burdick the sum of $150. for expenses incurred while Mr. Burdick was doing some work for him in Trenton.

2. Statement from Dr. Edward R. Miller, Bloomfield, New Jersey, that on February 1 and 22, 1950, he gave Mr. Burdick checks for $200.00 (total $400.00) for his efforts and advice.

3. Statement from Dr. J. Horace Loscalzo, Salem, New Jersey, that in appreciation for the untiring efforts put forth by Mr. Burdick, for the benefit of the Osteopathic profession, since 1940, he had gladly contributed Fifty ($50.00) annually to him.

4. Affidavit of Arthur J. Scholz, secretary, Senator Elmer H. Wene for Governor, Inc., that in 1949 his organization paid to Lester Burdick the sum of $1450.00 as travelling expenses in behalf of the candidacy of Mr. Wene for governor.

5. Statement of Dr. Lewis L. Walter, President of the Atlantic Eclectic Medical Society, Inc., that the Society presented Mr. Burdick with a gift of $300.00 for public relations work done for the society.

6. Statement from E. J. Howell, Trenton, New Jersey. stating that he made a gift of $100.00 in June, 1950, to Mr. Lester Burdick.

7. Statement of M. A. Walker, D. D. S., Wildwood, New Jersey, that he purchased Mr. Burdick's golf clubs for $150.00.

8. Statement by S. Trofea, Treasurer, Doctor's Hospital Association to the effect that the check it had given Mr. Burdick on January 3, 1951, was in nature of a gift in recognition of past courtesies extended to the Osteopathic profession by Mr. Burdick.

The above are some of the monies Mr. Burdick had given to him, and, most of which, he considered as gifts.

I will forward more statements to you within the next two weeks as some of the persons concerned are away on business trips.

I cite the following cases which appear to uphold Mr. Burdick's reasoning:

In Herman Dietrich Pet. vs. Commissioner 6BTA 1371, the Court said, "There was never any charge made by petitioner for any information or counsel he gave or any service he rendered the Bruners or either of them, nor was there any promise made or any assurance, express or implied, given him that he would be paid or compensated for what he did for them. The 216 shares of stock issued the petitioner *were an absolute gift*, which was made or promoted by the feeling of moral obligation and high sense of appreciation on John W. Bruner's part, for the kind and valuable services rendered him and his son by a genuine friend.

The fact that petitioner's friendship, suggestions, and services were beneficial to the business does not convert what was clearly a bona fide gift to petitioner into compensation for such services so as to make the amount of the gift income, taxable under the statute

And in Walter M. Bickford, Pet. vs. Commissioner, 34 BTA 461, the court held, "Whether a payment in a given case is taxable compensation or a gift exempt from tax depends upon the intention of the parties and particularly the intention of the payer, to be determined from the attending facts and circumstances; and in John McKeon vs. Commissioner, 39 BTA 817, the court stated, "The above facts show, we think, that the payment of $20,000 to the petitioner by the Executors of the Mastbaum Estate in 1930 was purely gratuitous. There was no contract or understanding of any kind that the petitioner would be compensated for his services and apparently there was no binding obligations on the estate to pay. As said in Earl S. Gwin, 14 BTA 392, 407, "Payments gratuitously made, though on account of some past act or service, do not constitute taxable income."

It is claimed that all the facts in this matter pertain to show that there was no willfulness or intention by the taxpayer to evade payment of any income tax due by him.

Very truly yours,

ROBERT M. TAYLOR,
Attorney for Lester H. Burdick.

EXHIBIT "B."

EXCERPTS FROM STATEMENT GIVEN TO JUSTICE DEPARTMENT BEFORE INDICTMENT OF PETITIONER BY ROBERT M. TAYLOR, ESQ., HIS COUNSEL.

"Mr. Burdick does not dispute that he received funds other than that reported in his tax returns. Some of these funds, however, were received by him, and considered by him, as gifts and gratuities, and not taxable income. Other funds were given to him for use as he saw fit in election contests, he being interested politically in said elections. He believed and contends that these funds were also not taxable. Still other nontaxable funds were received by him from insurance companies and from his mother.

We have attempted to prove this by submission of Affidavits, statements and letters, photostatic copies of which are attached hereto. It must be taken intc consideration that as the years have past some records have been lost and some names have been forgotten and people have moved or died. However, we are able to produce approximately 40% of such payments and trust that it will be received with the thought, that if the taxpayer can produce this much proof, then he is telling the truth and therefore the other funds came to him in the same categories.

For 1946 we show a total amount of $850.00 received by Mr. Burdick; $350.00 of it as gifts and $500.00 of it for election use. See affidavits 2, 3, and 4.

For 1947 we show a total amount of $2458.00 received by Mr. Burdick; $500.00 of it for election use, $50.00 of it as a gift, $308.00 as insurance loss proceeds, and $1600.00 from his mother's estate. See exhibits 2, 4, 5, and 6.

For 1948 we show a total amount of $2350.00 received by Mr. Burdick; $1500.00 for election use, $50.00 as a gift, and $800.00 from insurance loss proceeds. See Exhibits 2, 4, 5, and 6.

For 1949 we show a total amount of $2250.00 received by Mr. Burdick; $1950.00 for election use, and $50.00 as gifts. See Exhibits 2, 3, 4, and 7, and $150.00 for sale of golf bag and clubs.

For 1950 we show a total amount of $1922.00 received by Mr. Burdick; $500.00 for election use, $1250.00 as gifts, $272.00 from insurance loss proceeds, and $150.00 from sale of his golf bag and clubs. See Exhibits 2, 3, 6, 8, 9, 10, 11, and 12, and 13.

The amount of disputed unreported funds amounting to taxpayer's net worth statement amounts to $25,-399.50.

Also included in Taxpayer's accumulation of wealth is medical expense in 1946 of $230.50 and long terms capital gains in 1948 of $1831.55, in 1949 of $220 83 and in 1950 of $378.32."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 168

LESTER H. BURDICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals affirming the judgment of the District Court is reported at 214 F. 2d 768. The *per curiam* order of this Court vacating the judgment and remanding the cause to the Court of Appeals for consideration in light of the net worth cases decided December 6, 1954,[1] is reported at 348 U. S. 905. The

[1] *Holland* v. *United States*, 348 U. S. 121; *Friedberg* v. *United States*, 348 U. S. 142; *Smith* v. *United States*, 348 U. S. 147; *United States* v. *Calderon*, 348 U. S. 160.

opinion of the Court of Appeals reaffirming the judgment of the District Court (Pet. 45-47) is reported at 221 F. 2d 932.

JURISDICTION

The judgment of the Court of Appeals was entered May 6, 1955 (Pet. 48), and the petition for rehearing was denied May 24, 1955 (Pet. 49). The petition for a writ of certiorari was filed on June 20, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence, considered in the light of the net worth decisions, was sufficient to support the verdict.

2. Whether it was proper for the court of appeals, in reviewing the sufficiency of the evidence on remand, to consider the direct proof of specific items of unreported income when the bill of particulars indicated that the case would be established on the net worth expenditures method.

3. Whether petitioner was entitled to suppression of a net worth statement that he gave to a revenue agent, on the ground that the agent failed to warn him of his constitutional right not to incriminate himself.

4. Whether the trial court should have declared a mistrial because of alleged misconduct on the part of the prosecutor.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. *Penalties.*

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

Reference is made to the Government's prior brief in opposition in this case (No. 249, October Term, 1954) for a detailed statement of the facts involved, with record references. In brief, the evidence showed that over the five-year period (1946-1950) covered by the indictment petitioner's true net income (computed on the net worth-expenditures method) was more than triple the

amounts reported on his returns; that there was a substantial understatement in each of the five years; that petitioner voluntarily turned over to the agents his cancelled checks and bank statements but maintained no other records; that petitioner submitted to the Treasury agents, through his accountant, a net worth statement showing his assets and liabilities as of January 1, 1946, and December 31, 1950; and that the agents then made an independent investigation to verify the accuracy of the net worth statement and analyzed the cancelled checks to determine petitioner's nondeductible expenditures. It was also proved directly that a portion of the unreported income was attributable to petitioner's receipt of specific sums of money ranging between $1,900 and $5,700 per year, and totalling $14,500. Although petitioner testified that these sums represented gifts, the payers testified that they were for services rendered.

ARGUMENT

1. Petitioner contends (Pet. 15-20, 24-29) that the evidence, viewed in the light of the principles laid down by this Court last December in the four net worth decisions, was insufficient to support the jury's verdict of guilty. The contention that the evidence was insufficient was dealt with in our brief in opposition to the first petition (No. 249, October Term, 1954, pp. 7-9) and we find nothing in the opinions in the four net worth cases to impair the validity of the arguments made there. The first opinion of the Court of Appeals (214 F.

2d 768) is in harmony with the principles enunciated in the opinions of this Court in the net worth cases. The Court of Appeals' second opinion (Pet. 45-47) simply holds that since in this case there is direct proof of substantial amounts of unreported income, the conviction is sustainable on that basis alone and there is no need to reconsider the net worth features of this case. We think this holding is appropriate, particularly in view of the careful consideration given the net worth aspects of the case in the court's first opinion, which discusses the evidence in considerable detail.

In any event, there is no merit to petitioner's argument (Pet. 15-20, 24-29), which seems to center principally on the contention that the Government's evidence as to starting net worth (particularly that as to cash on hand) suffers from the infirmity that it was not corroborated by evidence other than petitioner's admissions to the Treasury agents. This is the argument rejected by this Court in *United States* v. *Calderon,* 348 U.S. 160, 168-169, and *Smith* v. *United States,* 348 U.S. 147, 154-159. Not only was there introduced into evidence specific corroboration of most of the items in the written net worth statement submitted by petitioner (R. 43-57), but there was substantial corroboration of the *corpus delicti* in the form of direct proof of petitioner's receipt from ten individuals of a total of $14,500 which the jury on proper instructions necessarily found to be unreported income and not gifts. This direct proof

alone "provides substantial evidence that the crime or crimes of tax evasion have been committed; the corroboration rule requires no more." *United States* v. *Calderon,* 348 U.S. 160, 168.

2. Petitioner contends (Pet. 36-39) that the Court of Appeals in its second review of the case should not have considered the direct evidence of unreported income because it was not within the scope of the bill of particulars (R. 9-13), which indicated that the unreported income was computed on the net worth-expenditures method. No objection was interposed to this evidence at the trial (R. 99-131, 165-195) nor has petitioner ever before contended that this evidence should be ignored because it was not outlined in the bill of particulars. Having failed to preserve the point, petitioner cannot rely upon it now, two years after the trial. In any event, there is no merit to the argument, because (1) the unreported income alleged in the indictment *was* proved on the net worth-expenditures method, as stated in the bill of particulars, and the proof of specific items of income was admissible by way of corroboration of the *corpus delicti* and in order to show a likely source of unreported income (*United States* v. *Calderon,* 348 U.S. at 168-169; *United States* v. *Chapman,* 168 F. 2d 997, 1001 (C.A. 7th), certiorari denied, 335 U.S. 853); (2) petitioner's admission (Pet. 22) that at his first trial he himself called these witnesses establishes that he was familiar with the transactions they testified to at both trials, and could not have been surprised at

the second trial; (3) petitioner's own testimony (R. 390-391) as to his reason for failing to report these items tends further to show lack of surprise; and (4) there was no variance affecting petitioner's substantial rights (*Berger* v. *United States,* 295 U.S. 78; *Smiley* v. *United States,* 186 F. 2d 903, 905 (C.A. 9th); cf. *United States* v. *Ragen,* 314 U.S. 513, 526).

3 and 4. Petitioner renews his contentions with respect to the admissibility of the net-worth statement that he gave to the revenue agent (Pet. 29-36) and his contentions with respect to alleged misconduct at the trial on the part of the United States Attorney (Pet. 39-43). The lack of substance in these contentions was sufficiently demonstrated in our original brief in opposition in this case (No. 249, October Term, 1954, pp. 9-11), to which the Court is respectfully referred.

CONCLUSION

For the reasons stated in the Government's original brief in opposition as well as those appearing above, it is submitted that the decision of the court below is correct. No conflict of decisions is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
JOHN H. MITCHELL,
RICHARD B. BUHRMAN,
HAROLD S. LARSEN,
Special Assistants to the Attorney General.

JULY, 1955.

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